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Judicial Protection as the Meta-norm in the EU Judicial Architecture

Volker Roeben¹ 

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Abstract

The rule of law in the European Union rests on a precarious decentralised judicial architecture with the two pillars of the judiciatures of the EU and of the Member States. Judicial protection emerges as the meta-norm for the governance of this complex governance scheme. It re-orientates the entire EU judicial architecture towards protecting individual rights grounded in EU law. The article makes three supporting arguments: First, the norm of judicial protection has become institutionalised in law, through the Charter of Fundamental Rights, the Treaty on European Union and relating jurisprudence of the Court of Justice of the European Union (the Court). Further, as judicial protection becomes a meta-norm, capable of overriding even conflicting primary EU law that would preserve the discretion of the political EU institutions or the procedural autonomy of the Member States. Finally, by reference to the norm of judicial protection, the Court's doctrine has been shaping a single code of procedure that welds the entire twin-pillared EU judicial architecture into a coherent whole. The article documents this single code of procedure for a horizontal dimension of the Court of Justice of the EU and a vertical dimension of the Member States courts. The implications of this rise of judicial protection to meta-norm applies to a wide variety of debates on the judicial architecture, ranging from a EU federal question jurisdiction of Member States courts, enforcement of the independence of the judiciary in the sovereign Member States, to the integration of international and third-country courts. The article concludes that the ultimate legitimacy of European integration depends on rights being taken seriously through their guaranteed judicial protection.

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1 Introduction

The Rule of Law in the European Union hinges on its judicial architecture. The Lisbon Treaty¹ has left unchanged the design, by the Founding Treaties, of a decentralised judicial architecture for the European Union that rests on two pillars, the judiciary of the European Union and the judiciaries of the Member States.² Both are organizationally independent. This article argues that since the entry into force of the Lisbon Treaty, that architecture has become much more centralised. Driving this transformation is the judicial protection that individuals ought to receive for their rights under EU law.³ In this role judicial protection replaces alternatives such as the effectiveness or authority of EU law or indeed the rule of law as such.⁴

To see and assess this transformational change, this article adopts an analytic, rather than a normative or legally-reconstructive approach. To that effect, the article re-conceptualises judicial protection as the new meta-norm for the EU judicial architecture. Understanding judicial protection as meta-norm gives a clearer perspective on driver and consequences of the changing law.

The concept of (meta)-norm originates in the explicative study of collective action in diverse contexts, in particular the social rules for actors in complex governance schemes.⁵ A meta-norm embodies the principal value judgments that actors may refer to when making hard choices in developing the scheme, and which explain these choices. The judicial architecture of the European Union can be seen as a complex scheme. Governing this two-pillared structure means making choices on trade-offs between competing values and interests, between decentralization and centralization, between strict judicial control and political flexibility, and between authority of law and effective contestation. The Court of Justice of the European Union (the Court)⁶ is the principal actor tasked with governing this scheme. Judicial protection has become the single meta-norm that provides the Court with orientation in governing this architecture. It directs for the architecture to be designed so that individuals receive the same effective protection to enforce their EU law-rights whenever these are contested, be it by the EU or the Member States, and by courts that operate under a single organizational and procedural standard, and that this protection is prioritised over competing values and interests.

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007 OJ C 306/1.

² Wells (2017) (decentralised judicial federalism for not setting up first instance EU courts with original jurisdiction over questions of EU law and noting the contrast with the centralised judicial federalism of the USA).

³ The Court speaks of 'judicial system', see *Slowakische Republik v Achmea BV*, Case C-284/16, 6 March 2018, ¶ 35.

⁴ Dougan, (2011) (effectiveness the dominant narrative).

⁵ Kooiman and Jentoft (2009).

⁶ Hereinafter, Court of the Justice of the EU comprises the European Court of Justice, the General Court, and specialised courts. References solely to the Court refer to the European Court of Justice (ECJ).

This conceptualization of judicial protection as the master-norm for the EU judicial architecture then leads to three claims that the article will make on the changing EU judicial architecture. First, judicial protection is progressively institutionalised through the EU Charter of Fundamental Rights, the amended Treaty on European Union, and the relating jurisprudence of the Court. Further, judicial protection drives the development of a single code of procedure for both pillars of the EU's judicial architecture, which the Court has been establishing through its dynamic jurisprudence. Third, judicial protection takes priority and overrides conflicting principles such as the EU institutions' discretion or the procedural autonomy of the Member States, morphing into constitutional core of the EU legal order.

The article hence demonstrates, first, that judicial protection has become an institution of EU law under the Treaty of Lisbon. The term is used here in the sense of a legal institution that turns an idea into law, through legislative and judicial decisions.⁷ The Charter of Fundamental Rights of the European Union (the Charter) now enshrines a fundamental right to judicial protection at the level of EU primary law. The animating idea of this fundamental right is to enforce individual rights and only rights. Right is a thick, value-bound concept, distinct from the formal completeness of the rule on which direct effect it is based. The amended art. 19(1) of the Treaty on European Union (TEU) turns the subjective right into an objective obligation for Member States to ensure that their judicial systems provide effective judicial protection. The Court, which has jurisdiction over the fundamental right, concretises it through subsequent decision of judicial protection. The Charter prescribes the methodology that the Court is to follow. This methodology requires balancing optimal judicial protection with countervailing objectives of an orderly procedure, by means of proportionality. It yields a set of generalisable outcomes that form doctrine.

The article then further argues that judicial protection drives the development of what will be labelled a single code of procedure. This code is not a single codification but rests on several normative layers, combining the primary law of the Charter and TEU and the relating jurisprudence of the Court with applicable EU legislation and compatible national legislation. This code steers the operation of all courts within the EU judicial architecture, so that Union and Member States courts adjudicate EU law in a coordinated manner. The code spells out judicial protection-driven choices for jurisdiction, procedure and remedies for courts in both pillars. It extends the jurisdiction of the Court over all acts of the political branches, exercised through a procedure convergent with the Member State level. It also guarantees the EU jurisdiction of Member States courts based on the federal question of an individual right, exercised through a harmonised procedure.

Third, judicial protection takes priority in developing the EU judicial architecture. It overrides conflicting principles even where formalised in the Treaties, such as the EU institutions' discretion and the mutual trust between the Member States. Judicial protection hence forms a constitutional core of the EU legal order law that cannot be altered through the treaty-amendment procedure. The article concludes

⁷ MacCormick (2008). Ostrom and Crawford (2005) defines institutions as “regularities of human action”.

that this constitutional role for judicial protection is justified, on normative grounds. The European Union includes individuals through rights. Rights taken seriously must be underpinned by guaranteed judicial protection. Judicial protection enlists the judiciaries of the European Union and the Member States to counter challenges to these rights, first procedurally and then substantively.

The article applies this framework to the jurisprudence of the Court that has shaped the EU judicial architecture after the entry into force of the Lisbon Treaty.⁸ The discussion will focus on key judgments of the Court's Grand Chamber in this period, with emphasis on the leading cases *Otis*,⁹ *Kadi*,¹⁰ *ECHR*,¹¹ *Rosneft*,¹² *Portuguese Judges*,¹³ *Achmea*¹⁴ and, most recently, *Judicial Independence in Poland*.¹⁵ These judgments have been widely discussed in academic writing. The present discussion will tease out the common theme of judicial protection that identifies and explains the choices that the Court has made in the transformation of the EU judicial architecture.

2 Institutionalising the Meta-norm of Judicial Protection

This Part demonstrates that and how the meta-norm of judicial protection is being institutionalised in EU law. The starting point is the EU Charter of Fundamental Rights that now enshrines the fundamental right of everyone to receive judicial protection for his or her rights (a). This 'right' is a thick concept focused on the legislatively intended entitlement rather than the completeness of the rule it is based on (b). The guaranteed judicial protection is delivered exclusively through the two-pillared EU judicial architecture (c). The Treaty on European Union, through its new art. 19(1) second subparagraph and through art. 7, absorbs the content of the fundamental right to judicial protection, binding the Member States throughout the scope of application of EU law in regard to the national pillar of the EU judicial architecture (d). Finally, the Court concretises the requirements of judicial protection, by balancing optimal rights protection with any countervailing objectives of an orderly judicial procedure. The outcomes of this balancing crystallise into doctrine. The thus concretised Charter fundamental right becomes the highest standard for all procedure, prevailing also over conflicting primary EU law. Charter and related doctrine yield a single code of procedure for the entire EU judicial architecture (e).

⁸ This is not to deny that the trend started earlier. See discussion below.

⁹ *Europese Gemeenschap v Otis NV and Others*, Case C-199/11, 6 November 2012.

¹⁰ *European Commission and UK v Yassin Abdullah Kadi (Kadi II)*, Case C-584/10 P, 18 July 2013.

¹¹ *Opinion 2/13: EU accession to the ECHR*, 18 December 2014.

¹² *PISC Rosneft Oil Company v Her Majesty's Treasury and Others*, Case C-72/15, 28 March 2017.

¹³ *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Case C-64/16, 28 February 2018 (Portuguese Judges).

¹⁴ *Slowakische Republik v Achmea BV*, Case C-284/16, 6 March 2018.

¹⁵ *Minister for Justice and Equality*, Case C-216/18 PPU, 25 July 2018 (Judicial Independence in Poland).

2.1 Judicial Protection as Fundamental Right

Pre-Lisbon, the Founding Treaties of the European Union did not make textual reference to judicial protection or a right to such protection. The European Court of Justice had, nevertheless, started to invoke concepts such as the rule of law for the ‘complete system of remedies’¹⁶, or the rule of law *and* fundamental rights¹⁷, to supplement the Treaty provision on remedies before the EU courts that the Treaties provided. The ECJ had also started in the *Factortame*¹⁸ and *Johnston*¹⁹ line of cases to require national courts to provide relief when applying EU law. The Court there had referred to effectiveness of EU law and also to judicial protection to justify this requirement. The legal basis of judicial protection had remained unclear, though. It could be the rule of law or fundamental rights grounded in a general principle of EU law derived from the European Convention of Human Rights and comparative constitutional law.

The Lisbon Treaty now clarifies the fundamental right quality of judicial protection. Art. 6(1) of the amended TEU authorises the Charter of Fundamental Rights of the European Union at the level of the Treaties.²⁰ The Charter through its Chapter VI dedicated to justice rights enshrines the fundamental right to judicial protection.²¹ At the head of that chapter, Charter art. 47 sets forth this right, which guarantees an effective remedy, access to court, fair process, and legal aid. Charter arts. 48–50 provide supplementary guarantees primarily but not exclusively for the criminal process, with a the presumption of innocence, the right to defence, the legality and proportionality of criminal offences and penalties, and the *ne bis in idem* guarantee.²² Additional procedural guarantees are provided by the several other fundamental rights in the Charter’s Chapter on Freedoms.²³ The Charter’s fundamental right to

¹⁶ “[...] the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions”, Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, ¶ 23.

¹⁷ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*, Joined Cases C-402/05 P and C-415/05 P, [2008] E.C.R. I-6351, ¶ 281 and 283.

¹⁸ *R. v Secretary of State for Transport Ex p. Factortame*, Case C-213/89, [1990] E.C.R. I-2433.

¹⁹ *Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R.

²⁰ Consolidated Version of the Treaty on European Union art. 6, 2012 O.J. C 326/13, at 19.

²¹ Charter of Fundamental Rights of the European Union art. 47, 2012 O.J. C 326/391, at 405. It reads in full “Right to an effective remedy and to a fair trial. (1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. (3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”.

²² *Id.* arts. 48–50. The Schengen-acquis contains the *ne bis in idem* principle of art. 54 of the Schengen Convention. *Zoran Spasic*, Case C-129/14 PPU, 27 May 2014.

²³ In particular the right of the child to be heard, art. 24 of the Charter.

judicial protection henceforth displaces the general principles as the source.²⁴ The Court has articulated this consequence.²⁵ It is visible between the *Kadi I*²⁶ and *Kadi II* cases, with the latter only mentioning Charter art. 47.²⁷ This fundamental right of judicial protection codified in the Charter absorbs the case-law relating to its previous manifestation as a general principle.²⁸

2.2 Judicial Protection of Rights

The fundamental right to judicial protection serves as the master-norm for the EU judicial architecture because it has a clear focus.²⁹ This is the individual right. The wording of the fundamental right establishes the term ‘right’ for the first time in primary law. It authorises an autonomous definition of the term, across the entire EU legal order. For purposes of judicial protection, individual right must be thick, evaluative concept that identifies that EU law whose practical effect courts should be securing. This concept of the right then is to be disassociated from important, related concepts, such as direct effect as well as direct applicability. The right is primary, while direct effect merely denotes one of several ways of enforcing it. Direct effect describes to the textual completeness of the provision so that it can be invoked before institutions applying EU law.

The wording of Charter art. 47 indicates four pointers for the thick concept of right. First, the right is to be found in the ‘law of the Union’. Thus, rules of EU law on all rungs of the normative hierarchy, i.e. primary, secondary and tertiary law, and on any subject matter, can create rights.³⁰ Second, the rule must ‘guarantee’ the right. Hence the demonstrable legislative objective to protect specific interests of a defined or definable group is critical. Intended entitlement does not depend of the precise, unconditional and complete formulation of the rule on which it is based. Third, ‘everyone’ is the bearer of the right to judicial protection, comprising natural persons but also juridical persons of private law³¹ and of public law including the

²⁴ Preamble of the Charter, recital 5, (‘reaffirms’); Protocol (no 30) ‘Application of the Charter of Rights to Poland and the United Kingdom’, ¶ 6, 2012 O.J. C 326/313: “whereas the Charter reaffirms the rights, freedoms and principles recognised in the Union and *makes those rights more visible*” (emphasis added); Declaration (no 1) concerning the Charter of Fundamental Rights of the European Union, ¶ 1, 2012 O.J. C 326/339 (‘confirms’).

²⁵ Chalkor AE Epexergasias Metallon v European Commission, [2011] E.C.R. I-13,085, ¶ 51: “Article 47 of the Charter implements in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer *only* to Article 47” (emphasis added); see also *Europese Gemeenschap v Otis NV and Others*, Case C-199/11, 6 November 2012, ¶ 46; ZZ, ¶ 50.

²⁶ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*, Joined Cases C-402/05 P and C-415/05 P, [2008] E.C.R. I-6351, ¶ 335.

²⁷ *European Commission and UK v Yassin Abdullah Kadi (Kadi II)*, Case C-584/10 P, 18 July 2013, ¶ 100.

²⁸ TEU, art. 6(3).

²⁹ Charter of Rights, art. 51.

³⁰ Explanations, 2007 O.J. C 303/17, at 29.

³¹ *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, [2010] E.C.R. I-13,849, ¶¶ 38–40.

EU itself.³² This includes all Union citizens. For them, guaranteed judicial protection for the rights that they hold qua their citizenships becomes a promise of real, that is reliable Citizenship.³³ For third-country nationals, it means equal protection for their rights. Fourth, and importantly, the right is protected if it is ‘violated’. No author of the violation is specified. Rights are directed against public authority, of the European Union or the Member States, as well as against another private party. Public-law and private-law rights are comprised.

In its jurisprudence, the Court has been developing such a uniform concept of right focused on securing the intended entitlement of individuals through judicial protection, and regardless of the completeness of the rule it is based on. Thus, in primary law, the Charter of Fundamental Rights enshrines fundamental rights to freedom and equality, citizenship and justice, and those all create individual rights.³⁴ Chapter IV—solidarity—also contains genuine fundamental rights under certain circumstances³⁵, not just principles within the meaning of Charter art. 53.³⁶ Under the Treaty on the Functioning of the European Union (TFEU), Union Citizenship³⁷ creates rights against member states other than the citizen’s state of nationality, but also against the state of nationality³⁸, and the European Union itself. Union Citizenship also creates derived rights for third-country nationals.³⁹ The fundamental freedoms of the Treaty, which are all worded as member state obligations, nevertheless create individual rights throughout the single market area⁴⁰, as recognised for the free movement of workers,⁴¹ free establishment⁴², the free provision of services⁴³, and the free movement of goods.⁴⁴

³² *Otis*, ¶ 44.

³³ Kochenov (2015).

³⁴ Charter of Rights, arts. 1–46. No legal significance attaches to the terminology of rights or freedoms.

³⁵ See International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’, Case C-438/05, [2007] ECR I-10,779; Laval un Partneri, Case C-341/05, [2007] ECR I-11767; Commission v. Germany, Case C-271/08, [2010] ECR I-7087 (regarding the right to collective bargaining and action of Art. 28 of the Charter of Rights). Further Lenaerts (2012).

³⁶ The Explanations mention Charter arts. 25, 26 and 37 as examples of principles. They also state that some provisions may contain both principles and rights, referring to Charter arts. 23, 33 and 34.

³⁷ Consolidated Version of the Treaty on the Functioning of the European Union, arts. 20–25, 2012 O.J. C 326/47, at 56–57 [hereinafter TFEU].

³⁸ *H.C. Chavez-Vilchez and Others v Raad van bestuur van de sociale verzekeringsbank and Others*, Case C-133/15, 10 May 2017.

³⁹ *Yoshikazu Iida v Stadt Ulm*, Case C-40/11, 8 Nov. 2012, ¶ 67; *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*, Case C-34/09, [2011] E.C.R. I-1177, ¶ 45.

⁴⁰ Cf Opinion of Advocate General Trstenjak in *Danske Slagterier v Bundesrepublik Deutschland*, Case C-445/06, [2009] E.C.R. I-2119, ¶ 75.

⁴¹ *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, Case 222/86, [1987] E.C.R. 4097, ¶ 15.

⁴² *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others*, Joined Cases Case C-46/93 and Case C-48/93, [1996] E.C.R. I-1025, ¶ 54.

⁴³ *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271, ¶¶ 32, 37.

⁴⁴ *Danske Slagterier v Bundesrepublik Deutschland*, Case C-445/06, [2009] E.C.R. I-2119, ¶¶ 22, 26.

The direct applicability or direct effect of secondary law is neither a necessary nor a sufficient condition to create a right. On the one hand, regulations are generally directly applicable⁴⁵, yet each must still be intended to create a right.⁴⁶ On the other hand, directives are generally only binding on member states⁴⁷ and may not be directly effective, yet they can still create rights. The chamber judgment in *DEB* illustrates how the Court constructs rights under a directive. The case concerned the directive on non-discriminatory access to gas networks.⁴⁸ The Court did not consider whether the directive had direct effect. It found that the directive was intended to create rights for gas providers.⁴⁹ The provider therefore had the fundamental right to legal aid for an action in damages it had suffered because of the late transposition of the directive.⁵⁰ *DEB* hence reprises, post-Lisbon, the earlier *Francovich*⁵¹ innovation. There, the Court had already recognised that the textually incomplete and therefore not directly effective provision of a directive could nevertheless create individual rights for the purposes of state liability.⁵² In *Francovich*, the Court did not specify the basis on which it prioritised the right over direct effect. The fundamental right to judicial protection now provides this basis. The right is primary and the remedy—direct effect or state liability—is secondary.⁵³ Finally, the Court has recognised that tertiary EU law can create rights.⁵⁴

This concept of the individual right extends beyond substantive to procedural rights, for instance regarding civil procedure in the internal market⁵⁵, judicial cooperation, and asylum procedure.⁵⁶ These substantive and procedural rights have as their addressee the European Union or the Member States; they are public-law rights.⁵⁷ But the concept of right also extends to private-law rights. Thus, in primary law, the Court

⁴⁵ TFEU, art. 288(2) and (4).

⁴⁶ Mohamad Zakaria, Case C-23/12, 17 Jan. 2013, for art. 6(1) of Regulation 562/2006 of the Parliament and Council establishing the Schengen Borders Code, 2006 O.J. L 105/1.

⁴⁷ TFEU, art 288(3).

⁴⁸ Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas (1998 O.J. L 204/1) and Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (2003 O.J. 2003 L 176/57).

⁴⁹ *DEB*, ¶¶ 27–29.

⁵⁰ *DEB*, ¶ 33.

⁵¹ *Francovich and others v Italian Republic*, Case C-6/90, [1991] E.C.R. I-5357.

⁵² *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Case C-6/90, [1991] E.C.R. I-5357, ¶¶ 17–22, 27 and 41.

⁵³ That being said, this article does not argue that all remedies, primary such as direct effect and secondary such as state liability, are equally effective in protecting rights and particular social and consumer rights, which has been convincingly been refuted, see Reich (2017), at 122–27.

⁵⁴ EU Civil Service Tribunal, *Martine Fouwels v Commission*, Case F-8/05 REV, 20 September 2011), ¶ 53.

⁵⁵ *L'Oréal SA and Others v eBay International AG and Others*, Case C-324/09, [2011] E.C.R. I-6011, ¶ 142.

⁵⁶ *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, Case C-201/16, 265 October 2017.

⁵⁷ *Åkerberg Fransson*, Case C-617/10, 26 February 2013, ¶ 22.

interprets the prohibition by TFEU art. 101⁵⁸ of anti-competitive agreements or practices to create for the competitor private-law rights to have these declared unlawful and to receive damages.⁵⁹ The Court has also held that Union Citizenship⁶⁰ and non-discrimination⁶¹ create private-law rights. This is also true for the fundamental freedoms of persons.⁶² These freedoms are not only functional market rights, but fundamental rights of each individual against powerful other private parties.⁶³ This fundamental right-rationale is lacking for the free movement of goods, however, and consequently that freedom does not yield a private law-right.⁶⁴ Secondary EU law can also create private-law rights.⁶⁵ Thus, in *Muñoz*, the Court concluded that Regulation 2200/96 on fair trading creates rights against infringing private parties.⁶⁶ In *L'Oreal*, the Court found Regulation 40/94⁶⁷ to confer a trademark right against other economic operators engaged in trade.⁶⁸ Directives create private law-rights, although the Court's jurisprudence limits their enforceability. There is no horizontal direct effect of directive. These therefore may only be enforced indirectly through a cause of action in national law.⁶⁹

2.3 Judicial Protection Through the EU Judicial Architecture

Judicial protections is ensured exclusively through the EU judicial architecture. The Member States cannot escape judicial protection neither unilaterally nor cooperatively. In *Achmea*, the ECJ Grand Chamber isolates the EU judicial architecture from any parallel network of international courts or tribunals ensuring judicial protection for rights.⁷⁰

⁵⁸ TFEU, art. 101.

⁵⁹ *Otis*, 6 Nov. 2012), ¶ 40. State aid that is illegal under TFEU post-Lisbon art. 108 (3), 2012 O.J. C 326/47, at 92, triggers the corresponding right on the competitor to have the subsidy declared invalid and to request that it be paid back. See *Transformateurs de saumon v Commission*, Case C-335/90, [1991] E.C.R. I-5505, ¶ 12.

⁶⁰ TFEU, art. 20; *Fertini*, Case C-411/98, [2000] E.C.R. I-8081.

⁶¹ *Id.*, art. 18; *Defrenne II*, Case 43/75, [1976] E.C.R. 455.

⁶² *Id.*, art. 46; *Walrave and Koch*, Case 36/74, [1974] E.C.R. 1405; *Id.* art. 49, 2012 O.J. C 326/47, at 67; *Viking Line*, Case C-438/05, [2007] E.C.R. I-10,229.

⁶³ cf Charter of Rights, art. 15(2).

⁶⁴ *Sapod Audic v Eco-Emballages SA*, Case C-159/00, [2002] E.C.R. I-5031, ¶ 74.

⁶⁵ It 'must be examined on a case-by-case basis whether its provisions confer rights on individuals', Opinion of Advocate General Gelhoed in *Antonio Muñoz y Cia SA, Superior Fruiticola SA and Frumar Ltd, Redbridge Produce Marketing Ltd*, Case C-253/00, [2002] I-7291, ¶¶ 23, 47.

⁶⁶ *Muñoz*, Case C-253/00, [2002] E.C.R. 7312, ¶¶ 27, 31.

⁶⁷ Council Regulation (EC) No 40/94 on the Community trade mark, 1994 OJ L 11/1 (now Directive 2008/95/EC of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (codified version), 2008 O.J. L 299/5.

⁶⁸ *L'Oréal*, [2011] E.C.R. I-6011, ¶ 54. But the regulation did not protect the interest of the proprietor in prohibiting the sale of a product bearing a trade mark through an online marketplace.

⁶⁹ Private-law rights still result from the primary law that the directive implements, *Werner Mangold v Rüdiger Helm*, Case C-144/04, [2005] E.C.R. I-9981.

⁷⁰ *Slowakische Republik (Slovak Republic) v Achmea BV*, Case C-284/16, 6 March 2018, ¶ 36: "In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of

Based on TFEU arts. 267⁷¹ and 344⁷², the Court there effectively declares investor-state tribunals established by treaties between Member States impermissible that would interpret and apply EU law and the rights of investors derived therefrom. This is the exclusive competence of the CJEU and the Member States courts. Nor can the European Union escape judicial protection through this architecture, as the *ECHR Opinion* makes clear: the EU is barred from conferring jurisdiction on the European Court of Human Rights to rule on the fundamental rights conferred by the Charter.

2.4 Judicial Protection as Objective Obligation: Art. 19(2) TEU and Art. 7 TEU

Institutionalising judicial protection as a fundamental right is thus powerful. Yet, the power is blunted by the strict threshold of application that applies to all fundamental rights of the Charter. Under Charter art. 51(1), the Charter only applies when Member States are implementing other EU law.⁷³ Since *Åkerberg Fransson*, this requires that EU law is determinative in the case at hand.⁷⁴ The Court's jurisprudence on this criterion has become increasingly exigent, possibly after a pushback from the Member States constitutional courts. The Court now requires a connection between the EU and national measures which goes beyond the subject-matters covered being closely related or one of those matters having an indirect impact on the other. Indicators are whether the national measure is intended to implement a provision of EU law, whether it pursues objectives other than those covered by EU law even if it is capable of indirectly affecting EU law, and whether it affects specific rules of EU law.⁷⁵

Given these limits, the new TEU art. 19(1) second subparagraph crucially supplements the Charter in institutionalising the meta-norm of judicial protection. This provision obligates the Member States to provide for remedies sufficient to ensure

Footnote 70 (continued)

Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law".

⁷¹ Art. 267 provides in relevant part that "[t]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; [...] Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. [...]".

⁷² Art. 344 provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

⁷³ Charter of Rights, art. 51(1).

⁷⁴ *Åkerberg Fransson*, Case C-617/10, 26 February 2013, ¶¶ 17 to 23 states that the Charter binds the Member States whenever EU is determinative of the facts. In cases such as *Zakaria*, ¶¶ 39, 40; and *Demarchi Gino Sas*, Case C-177/17, 7 September 2017, ¶¶ 22, 21, the Court examines this as a separate precondition for the applicability of Charter art. 47. In other cases, the Court immediately proceeds to the inquiry whether a right under Charter art. 47 is implicated, see Opinion of Advocate General Bot in *Agrokonsulting-04*, ¶ 21 (a judicial decision concerning a person outside of her EU rights does not fall under art. CFR 47).

⁷⁵ *Julián Hernández and Others*, Case C-198/13, 10 July 2014, ¶ 34, *Paoletti and Others*, Case C-218/15, 6 October 2016, ¶ 14.

effective legal protection.⁷⁶ In *Portuguese Judges*⁷⁷ the ECJ Grand Chamber has seized the chance to interpret and apply this provision, rather than the fundamental right to judicial protection as the Advocate General had recommended. The case concerned salary sacrifices of judges imposed by Portugal as part of an EU bail-out programme. The Court found that the provision applies throughout the scope of application of EU law. Each Member State must comply with it qua its membership in the European Union, binding it to the value of the rule of law laid down in TEU art. 2. The Court expressly rejected the stricter condition that Charter art. 51(1) imposes on the applicability of the fundamental right to judicial protection. The Court therefore tested the sacrifices against TEU art. 19, finding them compatible as they were not directed against the judiciary, but applied across the public sector.

Portuguese Judges has also clarified that TEU Art. 19(2)(2) as to its content is co-extensive with the requirements of the entire Charter art. 47.⁷⁸ Beyond the wording, it therefore contains requirements not just of remedies but also of an independent judiciary and a fair process. There exists a conduit between the fundamental right and the State's obligation to provide judicial protection. Finally, *Portuguese Judges* hints at direct applicability of that obligation. In other words, where national law fails to provide for the necessary rules, a court may have recourse to it to fill the gaps.⁷⁹ The applicability of this objective obligation to provide for effective judicial protection goes beyond the fundamental right, though. It is not tied to a national measure implementing EU law in the above strict sense. Nor is it necessary that an individual right be demonstrably present in a concrete case.

TEU art. 19 as interpreted by *Portuguese Judges* effectuates the meta-norm of judicial protection by overriding the limits that Charter art. 51 imposes. It becomes the vehicle with which the requirements of the fundamental right to judicial protection can be applied to assess structural problems of the Member States judicial system.⁸⁰ It is also the vehicle to address such problems, by the European Commission and the judiciary of other Member States.

In *Independence of the Judiciary in Poland*⁸¹, the Court's Grand Chamber questions the independence of the judiciary in Poland after the recent government reforms still meeting the essential requirements of the fundamental right to judicial protection. The findings of the European Commission that independence is not guaranteed can and must be relied upon by the courts of other Member States. That barred the requested extradition of an individual from Ireland to Poland pursuant to a European Arrest Warrant. The judgment is clear that judicial protection acquires the properties of a hard meta-norm for the EU judicial architecture. It overrides the

⁷⁶ The French and German text use "necessary" instead of "sufficient".

⁷⁷ Associação Sindical dos Juizes Portugueses v Tribunal de Contas, Case C-64/16, 28 February 2018.

⁷⁸ *Portuguese Judges*, ¶¶ 27, 29.

⁷⁹ Opinion of AG Mendozzi in *Portuguese Judges*, ¶ 61; "Thus, that second subparagraph is not aimed directly at the national judges, but is intended to ensure that possibilities of remedies exist in the Member States so that each individual is able to benefit from such protection in all the fields in which EU law is applicable" (internal citations omitted).

⁸⁰ Waelbroeck and Oliver (2017).

⁸¹ Minister for Justice and Equality (Case C-216/18 PPU), 25 July 2018.

principle of mutual trust between the Member States that the Court had declared foundational for that architecture. In fact, the Court goes further. Independence of the judiciary now is one of the minimum conditions that Art. 7 of the TEU establishes for membership in the European Union.

Read together, *Portuguese Judges* and *Independence* turn the requirements of the fundamental right to judicial protection into a standard for the internal legal orders of a State qua its membership of the Union.

2.5 Judicial Protection and a Single Code of Procedure for the EU Judicial Architecture

As meta-norm, judicial protection drives the development of a single code of procedure enabling the courts in the two-pillared judicial architecture to deliver effective and consistent protection. This section discusses the legal underpinnings of that demand, and shows that the Charter, the related doctrine, and the compliant procedure of the EU and the Member States form such a single code of procedure comprising the two pillars of the EU judicial architecture, with the overarching objective of protecting rights in EU law.

Legally, the fundamental right to judicial protection is a subjective right.⁸² All fundamental rights limit the exercise of public authority in individual instances.⁸³ But judicial protection is also the right to a state of affairs, beyond a specific omission or action.⁸⁴ It generates requirements and standards for general organisation and procedure as well for individual judicial decisions. While formulated with more precision than others, the fundamental right to judicial protection still is intensely dependent on authoritative concretisation at a lower level of abstraction. The Court provides this concretisation, and its decisions relating to judicial protection have an effect that goes beyond the exemplary value that all decisions on fundamental rights have.⁸⁵ These decisions can be generalised, they generate judicial doctrine. It relates to Charter rights and therefore partakes in its normative position, enjoying primacy over any conflicting procedure in Member State law. While this doctrine differs from full rules both in form and authority⁸⁶, it potentially entails full harmonization, beyond minimum harmonization, of national procedure. This doctrine can be directly applied by courts having jurisdiction.

⁸² *Kadi II*.

⁸³ The ECJ has invalidated EU legislation under different Charter rights: for instance data protection in art. 8 (Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen, Joined Cases Case C-92/09 and Case C-93/09, [2010] E.C.R. I-11,063); and non-discrimination in art. 21 (Association belge des Consommateurs Test-Achats ASBL and others v Council, Case C-236/09, [2011] E.C.R. I-773). The Court also interprets the EU legislation to conform to fundamental rights, for instance art. 4 on the prohibition of cruel and unusual treatment (N.S. v Secretary of State for the Home Department and M.E. v Refugee Applications Commissioner, Joined Cases Case C-411/10 and Case C-493/10, 21 Dec. 2011).

⁸⁴ McCormick, at 187–205.

⁸⁵ *Id.* at 204.

⁸⁶ *Id.* at 39–60.

The Court's judgment in *Baláz* illustrates this doctrine-making. It concerned the execution of a financial penalty pursuant to Council Framework Decision 2009/299/JHA on the application of the principle of mutual recognition to financial penalties.⁸⁷ The ECJ Grand Chamber there stated that, to comply with Charter art. 47, the national court entering the penalty must have full jurisdiction and apply a specific procedure that the Court defined.⁸⁸ As part of this procedure, the decision imposing the penalty must be made available to the individual in a language she can understand; and there must be clear instructions on how to appeal, within what time-limit, representation, and legal aid.

The competence of the Court for developing this doctrine lies in both the general responsibility as the ultimate arbiter of EU law pursuant to TEU art. 19(1) and in the specific responsibility to promote the fundamental right to judicial protection.⁸⁹ The capacity of the Court to develop it is rooted in methodology. As to that methodology, Charter art. 52(1) determines that judicial protection has the structure of a Dworkinian principle. Judicial protection thus is to be optimised by effectuating the underlying right as much as possible vis-à-vis a private or public contestation. This encompasses using procedural institutions that have been developed in national and supranational law, but ultimately is a function of the underlying right. The optimal judicial protection then is limited by countervailing objectives. Charter art. 52(1) refers to 'general objectives recognised in EU law'. A functioning procedure, with legal certainty, judicial economy, and a legitimate claimant, can be such objectives. Member States' procedural autonomy as such is not an objective. It is for the Court to recognise the goals underlying national procedure as objectives of EU law. Proportionality becomes the mechanism for balancing optimal judicial protection and the countervailing objectives. The outcome of this balancing provides not just the right answer for the case at hand but constitutes doctrine.

The articulation of such doctrine impugns the space for particular-plural procedures of the Member States, protected by the subsidiarity principle. Subsidiarity calls for respecting national legislatures' value-judgments on the procedure of their courts.⁹⁰ Charter art. 51(1) subjects the Charter-related jurisprudence to this principle. The Court accommodates it by according a margin of appreciation to the Member States' legislatures and courts. The margin is reflected in the jurisprudence that the national procedure as a system must comply with Charter art. 47, rather than each individual rule. There can thus be alternative procedural avenues to achieve the requisite level of protection. The Charter-prescribed methodology yields uniform requirements, but these allow for plural modes of implementation.

⁸⁷ Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (2005 O.J. L 76/16), as amended by Council Framework Decision 2009/299/JHA (2009 O.J. 2009 L 81/24).

⁸⁸ *Baláz*, Case C-60/12, 14 Nov. 2013, ¶ 47; also Opinion of AG Sharpston, 18 July 2013, ¶¶ 82–84.

⁸⁹ Charter of Rights, art. 51(1).

⁹⁰ For criminal and civil procedure, TFEU art. 67(1) provides: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the *different legal traditions of the member states*" (emphasis added).

The second prong of the Court's methodology references the rich jurisprudence of the European Court of Human Rights (ECtHR) relating to the European Convention of Human Rights.⁹¹ The Convention lays down justice rights in arts. 6 and 13, as well as subject-specific procedural guarantees in arts. 3, 5 and 7.⁹² The ECtHR's methodological approach also balances judicial protection with countervailing objectives expressed in the national procedure, seen as a system, through proportionality.⁹³ It produces a rich reservoir of outcomes, that often reflect the consensus in the Contracting States. Charter arts. 52(3) and 53 require the Court of Justice to follow their interpretation by the ECtHR. The case-law of that court on judicial protection becomes the benchmark for the Court of Justice in the interpretation of the Charter. Adopting it provides the Court with particular legitimacy when setting central-uniform doctrine in place of particular plural procedures at Member State level.⁹⁴ This legitimacy explains the rich referencing of the Court to the Strasbourg case law.⁹⁵ Charter art. 52(3) only permits the Court to go beyond this benchmark.⁹⁶ The Charter already codifies such 'excess', pre-Lisbon case-law of the ECJ. Charter art. 47 covers all the rights conferred on individuals by EU law whereas ECHR art. 6 only protects private rights (in national law)⁹⁷; Charter art. 49(1) prescribes that more lenient penal law applies retroactively; and Charter art. 50 provides for a transborder ne bis in idem guarantee. The interpretation of the Charter rights by the Court of Justice has also reflected on the interpretation of the Convention by the European Court of Human Rights.⁹⁸ Convention and Charter become mutually reinforcing in setting procedural standards.

The Charter and related doctrine hence set the standards for all procedure within the scope of application of the Founding Treaties. They set standards for the EU legislature in adopting procedural legislation⁹⁹, for which it has competences regarding for instance consumer protection¹⁰⁰, judicial cooperation in civil and criminal

⁹¹ Opinion of Advocate General Kokott in Łukasz Marcin Bonda, Case C-489/10, 11 Dec. 2011, ¶ 43.

⁹² Explanations, art. 47.

⁹³ *Golder v United Kingdom* (1979-1980) 1 EHRR 524, ¶ 36; *Klass and others v Germany* (1994) 18 EHRR 305, ¶ 49; *Ashingdane v the United Kingdom* (1985) 7 EHRR 528, ¶ 55-57; and *Lithgow and others v United Kingdom* (1986) 8 EHRR 329, ¶ 194.

⁹⁴ Further Ward (2009) 329.

⁹⁵ Exemplary is *Samet Ardic*, Case C-571/17 PPU, 22 December 2017, ¶¶ 74, 75. Further de Búrca (2013), at 174-175.

⁹⁶ Under *Bosphorous Hava Yollari Turizm v Ireland* [GC], no 24833/94, ECHR 2005-VI, the ECtHR will only assess the general level of judicial protection under the Charter against the Convention, but not individual decisions.

⁹⁷ ECtHR, *Coorplan-Jenni GmbH and Hascic v Austria*, No 10523/02, 27 July 2006, ¶ 56. Further Harris et al. (2014), at 391-392.

⁹⁸ ECtHR, *Sergey Zolotukhin v. Russia*, [GC], No. 14939/03, 10 Feb. 2009 (interpreting the concept 'idem' in light of the case-law of the ECJ, with emphasis on the identity of the facts instead of their legal classification).

⁹⁹ *Commission v Belgium*, Case C-155/91, [1993] E.C.R. I-939.

¹⁰⁰ On the basis of TFEU art. 114, see Regulation (EU) 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, 2013 O.J. L 165/1.

matters¹⁰¹ and asylum.¹⁰² They also set the standards for the Member States legislatures. Those retain the residual legislative competence for the procedure of their courts when applying EU law, TEU art. 4(1). The Court has been referring to this competence as ‘autonomy’ of the Member States.¹⁰³ But the exercise of this competence must comply with the fundamental right of judicial protection enshrined in Charter art. 47. This is true regardless of whether it was specifically enacted to implement EU law. The fundamental right requires the Member States not just to respect, but also to take positive legislative action fill any gaps in their procedure.¹⁰⁴ The national judge may resort directly to Charter art. 47(1) supplying any requisite supplementary rules. Importantly, however, the general condition set forth in Charter art. 51(1) applies. The Charter’s fundamental right to judicial protection therefore only binds the Member States when ‘implementing’ other EU law. Finally, the fundamental right to judicial protection sets standards for the Contracting Parties when amending the Founding Treaties on the EU judicature. The Court has confirmed this controversial effect in its recent *Rosneft*-judgment that will be discussed infra.

The following parts of the article will trace the development of this code of procedure, primarily by reference to the cases of the Grand Chamber of the European Court of Justice. Part 3 turns to the Union pillar and Part 4 to the pillar of the Member States courts.

3 The Single Code of Procedure (I). Judicial Protection and the Court of Justice of the European Union

The Court of Justice of the European Union constitutes the first pillar of the EU judicial architecture. In that pillar, the meta-norm of judicial protection drives a dynamic expansion of judicial review over the acts of other EU institutions and

Footnote 100 (continued)

See also Communication from the Commission, ‘Towards a European Horizontal Framework for Collective Redress’, COM(2013) 401.

¹⁰¹ Under the competences for the Area of Freedom, Security and Justice, TEU, art. 3(1) and Part III Title VI of the TFEU, arts 82–86. See for criminal procedure for instance Directive 2010/64 on the right to interpretation and translation in criminal proceedings, 2010 O.J. L 280/1; Directive 2012/13 on the right to information in criminal proceedings, 2012 O.J. L 142/1; and Directive 2013/4 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 2013 O.J. L 294/1; for private law procedure see for instance Regulation (EC) 861/2007 establishing a European Small Claims Procedure, 2007 O.J. L 199/1; and Regulation (EC) No 1896/2006 Creating a European order for payment procedure, 2006 O.J. L 399/1.

¹⁰² TFEU, arts. 67–89.

¹⁰³ TEU, art. 4(1). It reads “In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States”. *Lesoochránárske zoskupenie*, Case C-240/09, 8 March 2011, ¶ 47; and *Star Storage and Others*, Case C-439/14 and Case C-488/14, 15 Sept. 2016, ¶ 46.

¹⁰⁴ *Oris*, ¶ 64 (independence of court requires procedure legislation in national law).

bodies. What is more, it crystallises into a formal meta-norm, displacing conflicting primary law purporting to limit judicial review in the interest of the authority of EU law. On this basis, the Court's jurisprudence has been closing gaps in judicial review that the Treaties leave for non-justiciable political decision-making by the EU institutions (a). The meta-norm of judicial protection also drives the evolution of the procedure that the CJEU follows in exercising its jurisdiction. As a consequence, this procedure converging with that of the Member States (b).

3.1 The Jurisdiction of the CJEU over All Acts of the EU Institutions

The Lisbon Treaty has confirmed the jurisdiction of the CJEU for judicial review of EU acts.¹⁰⁵ The Treaty has also established that this jurisdiction extends beyond the EU institutions within the meaning of TEU art. 13 to all EU bodies of the EU. But the Treaty continues to restrict the substantive scope of this judicial review. Post-Lisbon, TEU art. 24(1)(2) removes acts of the Council taken under the Common Foreign and Security Policy, excepting only those acts that can be challenged in a direct action pursuant to TFEU art. 263(4). Such a direct action for annulment will have to meet the narrow locus standi requirements, though.¹⁰⁶ This restriction preserves non-justiciable executive, intergovernmental discretion in external EU action.¹⁰⁷

Yet, judicial protection does not tolerate enclaves of non-justiciability. Where individual rights created in EU law are contested, there the Court ought to have jurisdiction to review the institution's act, in both direct and indirect actions, without restrictions. The meta-norm of judicial protection directs the Court to limit the scope of the Treaty rule through authoritative interpretation. It emerges as a formal meta-norm within the primary law.

The Court has built up to this result incrementally in its case-law.¹⁰⁸ The 2017 judgment of the ECJ Grand Chamber in *Rosneft*¹⁰⁹ now establishes clearly that judicial review covers Common Foreign and Security Policy acts that affect individual rights, regardless of whether the action is direct or indirect. The case concerned the EU sanctions regime regarding Russia, based on Council Decision 2014/512/CFSP

¹⁰⁵ TEU, art. 19; TFEU, arts. 251–281; Protocol on the Statute of the Court of Justice of the European Union, 2012 O.J. C 326/210.

¹⁰⁶ TEU art. 24(1), in relevant part, reads as follows: "The [CJEU] shall not have jurisdiction [over the CFSP], with the exception of its jurisdiction [...] to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the [TFEU]". The relevant part of TFEU article 275(2) reads as follows: "the Court shall have jurisdiction [...] to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons [adopted under the CFSP]".

¹⁰⁷ See Koutrakos (2018). On the extension of general principles of national constitutional law to foreign relations see Sitaraman and Wuerth (2015) (for the USA).

¹⁰⁸ Cases discussing these issues include *P H v. Council et al.* Case C-155/14; *Elitaliana SpA v. EULEX Kosovo*, Case C-439/13 P; and *Opinion 2/13*, Accession to the ECHR.

¹⁰⁹ *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, Case C-72/15, 28 March 28 2017.

and Council Regulation 833/2014.¹¹⁰ Rosneft's judicial review action in national court challenged the British 'Export Control (Russia, Crimea, and Sevastopol Sanctions) (Amendment) Order 2014' which gave effect to some of the EU sanctions in the United Kingdom. The Grand Chamber found it had jurisdiction for the preliminary ruling, which the UK High Court had requested on the validity of the Council decision¹¹¹, because of the fundamental right of Rosneft to receive judicial protection against this Common Foreign and Security Policy act.¹¹² Judicial protection is the rationale of the judgment, which only refers in passing to the rule of law.¹¹³ The Court could and did leave open whether the Partnership Agreement between the EU and Russia creates individual rights that require such protection. For such a right is the Charter's fundamental freedom to conduct a business¹¹⁴ that Rosneft is a bearer of and that the sanctions limit.

Rosneft now takes that final step. There, the Court gives effect to judicial protection through the corrective interpretation of the TFEU, because otherwise there would have been no judicial review. In *Rosneft*, judicial protection overrides the considered, recently expressed position of the Contracting Parties expressed in the Treaty. The *Rosneft*-Court supports this move to establish judicial protection as a formal meta-norm by referencing the established *Les Verts* doctrine. On the basis that the Treaty provides for a complete system of remedies, the Court in *Les Verts* had also corrected the Treaty provision that *Parliament* had no standing to bring actions for annulment. *Les Verts*, however, had argued with the rule of law. *Rosneft* now absorbs the *Les Verts* doctrine into the fundamental right to judicial protection. According to the Court in *Rosneft*, it is "inherent" in the Union's "complete system of legal remedies or procedures that *persons* bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts".¹¹⁵

The Court thus claws back its jurisdiction to the extent necessary for judicial protection. In *Rosneft*, judicial protection becomes a hard or formal meta-norm within EU primary law. Where an individual right needs protection, there the Court may set aside a limiting Treaty rule. The legal basis of this meta-norm function is, however, difficult to establish. Art. 6(1) incorporates the Charter of Fundamental Rights only on the same normative rung as the Treaties. Charter art. 51(1) correspondingly only names the EU institutions as Charter rights addresses, but not the Contracting Parties themselves.¹¹⁶ The argument that the fundamental right of judicial protection is

¹¹⁰ EU sanctions are enacted in two steps. The Council adopts a decision under the CFSP, TEU Title V, Chapter 2, which is then implemented in EU law through a regulation adopted under TFEU art. 215.

¹¹¹ *Rosneft* also confirms that the regulation adopted under TFEU art. 215 is within the jurisdiction of the CJEU, at ¶¶ 105–106.

¹¹² *Id.*, ¶¶ 69–75.

¹¹³ *Id.*, ¶ 72.

¹¹⁴ Charter of Rights, art. 16.

¹¹⁵ *Rosneft*, ¶¶ 67–68 (Emphasis added).

¹¹⁶ Charter art. 51(1).

the standard for the Treaty-based jurisdiction of the Court can nevertheless be made. The starting point is that the Contracting Parties of the Founding Treaties are bound by the European Convention of Human Rights and its judicial protection guarantees.¹¹⁷ This creates the presumption that the Treaties comply with the ECHR and therefore with the corresponding right of judicial protection enshrined in Charter art. 47. Furthermore, Charter art. 51(1) requires the Court itself to respect and promote Charter art. 47 when interpreting the Treaties.

The decisive step in *Rosneft* is cast into sharper relief when seen against the background of other constellations in which the Court had to confront the compatibility of Treaty-defined judicial review with the fundamental right to judicial protection. Prior to Lisbon, the Court of Justice had already stated that judicial protection had to be respected and demonstrated a willingness to correct the Treaty procedure.¹¹⁸ In other cases, it had deferred to the Contracting Parties to draw the consequences for the Treaty procedure.¹¹⁹ After the entry into force of the Lisbon Treaty, the Court had established that Charter art. 47 is the yardstick for primary law and that it is ready to indicate the consequences should the standard not be met. In *Chalkor*, the Court stated that Charter art. 47 requires effective judicial review of EU acts in law and fact *and* that this review is arranged in the Founding Treaties.¹²⁰ The *Chalkor*-Court suggests that the EU legislature must supplement the Treaties, that would otherwise fall short of the requisite judicial protection. The judicial review provided for by the Treaties of Commission decisions penalising anticompetitive conduct is not contrary to Charter art. 47, because the review of legality provided for in TFEU art. 263 is supplemented by the unlimited jurisdiction in respect of the amount of the fine provided for in Regulation (EC) No 1/2003.¹²¹ In *Sugars*, the Court finds that “the conditions for admissibility laid down in the fourth paragraph of TFEU art 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection”, although it cautions against setting aside those “conditions laid down in that Treaty”.¹²² The *Sugars*-Court could shy away from the final step because the plaintiff there could initiate an indirect action under TFEU art. 267 TFEU.

¹¹⁷ Charter art. 51(1).

¹¹⁸ In *Evropaïki Dynamiki v EMSA*, Case T-70/05, [2010] E.C.R. II-313, the General Court established beyond the wording of EC art. 230(1) that acts of created EU bodies were also reviewable. The Lisbon Treaty has amended TFEU art. 263(1) accordingly.

¹¹⁹ Namely regarding the standing of private parties for direct actions pre-Lisbon EC. In *UPA*, the Court stated that the primary law needed to provide judicial protection, but then referred to the constituent power. *Unión de Pequeños Agricultores v Council*, Case C-50/00 P, [2002] E.C.R. I-6677, ¶ 43, and *Commission v Jégo-Quéré*, Case C-263/02 P, [2004] E.C.R. I-3425, ¶ 33.

¹²⁰ *Chalkor*, [2011] E.C.R. I-13,085, ¶ 53; *Otis*, 6 November 2012, ¶ 56.

¹²¹ *Chalkor*, [2011] E.C.R. I-13,085, ¶ 53; also *Otis*, ¶ 56, relating to the penalties for undertakings engaged in anticompetitive behaviour in secondary law.

¹²² *T & L Sugars and Sidul Açúcares v Commission*, Case C-456/13 P, 28 April 2015, at ¶ 44.

3.2 Procedure

Charter art. 47 governs not just the jurisdiction but also the procedure of the EU courts. The demands of optimal protection through procedure and any counter-vailing objectives of an orderly procedure are essentially the same for Union and national procedure.¹²³ The outcomes of the balancing should therefore crystallise into doctrine for both union and national courts. The Court has indeed been transferring procedural institutions, bottom-up from the national to the Union level and top-down from the Union to the national level.

Bottom-up, the Court transfers to the EU level doctrine relating to the right to judicial protection it had established originally for the procedure of the Member States courts. The *Kadi* cases highlight this for the right to a defence and the standard of judicial review of adverse administrative decisions.¹²⁴ These cases concerned EU measures implementing UN Security Council asset freezing resolutions. The General Court was to review the Commission acts designating Yassin Kadi.¹²⁵ In *Kadi I*, the Commission had done so under Regulation 881/2002, without communicating the reasons and without hearing Kadi.¹²⁶ In the appeal decision, the Court stated that EU acts infringing individual rights are subject to judicial review by the EU courts. It then defined the standard of such review by reference to *Heylens*.¹²⁷ That early judgment had established that adverse administrative decisions of Member States authorities must be motivated in such a way that they can be effectively reviewed.¹²⁸ The Court in *Kadi I* transferred this standard to the EU level, demanding that EU acts also have to be motivated to enable review. The Court therefore annulled Regulation 881/2002 that did not to require motivation. The subsequent case *Kadi II* concerned the amended Regulation 881/2002.¹²⁹ Under it, the Commission had provided Kadi with a statement of the summary grounds it had obtained from the UN Security Council. The Court referred to the recent case of *ZZ* where it had discussed the fundamental right of defence and the relating standard of judicial review of national acts taken on security grounds.¹³⁰ There, the Court had defined a balance between effective judicial review and legitimate security concerns, demanding that the individual must know the main grounds that the adverse administrative

¹²³ For instance *Groupe Gascogne*, 26 Nov. 2013 (excessive length of the proceedings before the General Court).

¹²⁴ *Kadi I*, [2008] E.C.R. I-6351, ¶¶ 53, 336; *Kadi II*, 18 July 2013.

¹²⁵ See de Búrca (2010).

¹²⁶ Council Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, 2002 O.J. 139/9 (as amended). Its Annex I contains a list, which is regularly reviewed, of organisations, entities and persons suspected of being involved in terrorist activities.

¹²⁷ *Kadi I*, ¶¶ 53, 336. The reliance on the *Heylens* precedent is remarkable for case-law exists that the lack of motivation of a Commission decision constitutes its unlawfulness, for instance *Germany v Commission*, Case C-329/93, [1996] I-5151, ¶ 22.

¹²⁸ *ZZ*, ¶ 61.

¹²⁹ Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation No 881/2002, 2009 O.J. 2009 L 346/42.

¹³⁰ *Kadi II*, ¶ 100.

decision is based on, either from the decision itself or by obtaining disclosure of those grounds in the judicial proceedings. In *Kadi II*, the Court transferred this standard to the EU level, concluding that the Commission must give reasons that are “individual, specific, and concrete”.¹³¹

Top-down, the Court has also transferred doctrine relating to the right to a fair process from the national to the EU level. In *Otis*, having declared that the EU courts have exclusive jurisdiction over the validity of EU acts, the Court stated that the equality of arms derived from that provision is valid both in national and EU proceedings. *BEG* confirms that legal aid must be accorded in similar conditions in proceedings against national and EU acts.¹³² The Court has emphasised this sameness also for the countervailing objectives. Thus, the respect of *res judicata* is equally valid for both national and EU procedures¹³³, as is *ne ultra petita*.¹³⁴ Both procedures may legitimately provide for time-limits in the interest of legal certainty, provided they meet the proportionality test.¹³⁵

Uniform EU procedure effectively pre-empts the national procedure where a case before a Member State court concerns the validity of EU act. Doctrine holds that the Member States courts then are to follow the same procedure as the EU courts. The Court has affirmed this in *Unibet*, relating to the interim relief that national courts can grant against EU acts. The Court there set the uniform-central rules on interim relief against EU acts granted by either union or national courts expressly apart from the particular-plural rules that continue to govern interim relief against national acts otherwise.¹³⁶ Still, *Unibet* suggests that the fundamental right to judicial protection demands there must be interim relief against both EU and Member State acts under similar conditions.¹³⁷

The liability of the legislatures of the European Union and the Member States for violating individual rights is also converging.¹³⁸ The template here has been the liability of the European Union before the EU judicature, which presupposes that a higher norm confers a right which has been violated in a qualified manner.¹³⁹ That criterion protects the EU legislature’s broad discretion in economic and certain other matters.¹⁴⁰ The Court has transferred these criteria to Member States liability. In so doing, it has explicitly recognized that the protection of an individual right must be

¹³¹ *Id.* ¶¶ 117–134. Such review needs to balance judicial protection and the respect for UN Charter art. 24 and the international anti-terrorism regime, an objective within the meaning of CFR art. 52(1), *id.* ¶¶ 103, 131.

¹³² cf *DEB*, ¶ 6.

¹³³ *Commission v Luxembourg*, Case C-526/08 [2010] E.C.R. I-6151, ¶ 26; *ThyssenKrupp Nirosta v Commission*, Case C-352/09 P, [2011] E.C.R. I-2359, ¶ 123.

¹³⁴ *British Airways v Commission*, Case C-122/16 P (delivered Nov. 14, 2017).

¹³⁵ *Bell & Ross v OHIM*, Case C-426/10 P, [2011] ECR I-8849, ¶ 42.

¹³⁶ *Id.* ¶ 79.

¹³⁷ *Id.* ¶ 81.

¹³⁸ Liability of the Union for unlawful acts has its base in TFEU post-Lisbon art. 340, whereas that of the Member State is considered to be inherent in the system of the Treaty, *Günter Fuß v Stadt Halle*, Case C-429/09, [2010] ECR I-12167.

¹³⁹ *Schöppenstedt*, Case 5/71, [1971] E.C.R. 975.

¹⁴⁰ *HNL*, Case 83/76, [1978] E.C.R. 1209; *Id.*; *Bergaderm v Commission*, Case C-352/98 P, [2000] E.C.R. I-5291, ¶ 41.

the same against infringements by either the EU or the Member States. Methodologically, the discretion of the democratically accountable legislatures is recognised as a countervailing objective, to be balanced with effective judicial protection in the same fashion on both the EU and Member State level. As a result, in general a Member State legislature is liable for a breach of EU law only if it manifestly and gravely disregarded the limits of its discretion.¹⁴¹ By contrast, where the EU law obligation is clear, leaving no discretion, there a breach entails liability. That is the case for non-transposition of a directive¹⁴² and pre-empted legislation.¹⁴³

4 The Single Code of Procedure (II). Judicial Protection and the Member States Courts

This judicatures of the Member States form the second pillar of the EU judicial architecture.¹⁴⁴ Pre-Lisbon, the Court had continuously stated that, in the absence of EU law, it is for the Member States to determine jurisdiction and procedure of their courts even when applying EU law.¹⁴⁵ Yet, Judicial protection overrides this norm, driving towards the central-uniform construction of jurisdiction and procedure and shaping the vertical dimension of the code of procedure. Accordingly, the Court's doctrine under Charter art. 47 has been guaranteeing jurisdiction of national courts over rights conferred by EU law (a). The Charter-related doctrine has also been harmonising the procedure of national courts (b).

4.1 The Jurisdiction of Member State Courts over Rights Under EU law—the EU Federal Question

The Lisbon Treaty leaves unchanged the decentralised judicial architecture that does not establish first instance EU courts with general jurisdiction. This is paired with the expectation that the Member States court apply EU law, expressed in the referral procedure, TFEU art. 267. The Member States courts are to exercise jurisdiction that is grounded in EU law, not national law. The basis of this jurisdiction had,

¹⁴¹ *Combinatie Spijker Infrabouw-De Jonge Konstruktie* and others, Case C-568/08, [2010] ECR I-12,655, ¶ 87; earlier *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, Case C-35/11, [2006] I-11,753, ¶ 212; *Brasserie du pêcheur*, [1996] E.C.R. I-1029, ¶ 47.

¹⁴² *Erich Dillenkofer and others v Bundesrepublik Deutschland*, Joined Cases Case C-178/94, Case C-179/94, Case C-188/94, Case C-189/94 and Case C-190/94, [1996] E.C.R. I-4845 (non-transposition of directive).

¹⁴³ TFEU, art 2(2), ex parte *Hedley Lomas*, Case C-5/94, [1996] E.C.R. I-2553, and *Commission v Denmark*, Case C-23/94, [1994] E.C.R. I-3450 (pre-empted legislation).

¹⁴⁴ TEU art. 4(1).

¹⁴⁵ Confirmed post-Lisbon in Case C-93/12, *Agrokonsulting-04*, 27 June 2013, ¶ 35; *Bund für Umwelt und Naturschutz Deutschland* (intervening party: *Trianel Kohlekraftwerk Lünen GmbH & Co. KG*), Case C-115/09, [2011] E.C.R. I-3673, ¶ 43 9 (hereinafter *Trianel*).

however, never been identified. Judicial protection now provides that basis. Charter art. 47(1) and (2) requires an effective remedy before a competent tribunal. While formulated as a subjective right, the provision obligates national courts to deliver such remedy. It also empowers them to do so. This entails the jurisdiction of these courts to review EU law in fact and in law. The jurisdiction is guaranteed directly by Charter art. 47. It does not depend on nor can it be interfered with by Member State legislation.¹⁴⁶ As the fundamental right serves to protect rights in EU law, this guaranteed jurisdiction is predicated on the presence of an individual right in the concrete case. The individual right becomes the ‘federal question’ that turns national courts into *juges de droit communautaire*.

The judgments of the ECJ Grand Chamber in *ZZ* and *Otis* articulate this doctrine. In *ZZ*, the Court was concerned with the review by a UK court of an administrative decision denying a Union citizen entry without fully stating the underlying reasons. It stated that Charter art. 47 itself was both the source of obligations of the national court and the basis of its jurisdiction to review in law and fact the administrative decision, regardless of whether this power was provided in full in domestic law.¹⁴⁷ In *Otis*, the Court has clearly articulated the link between jurisdiction and the presence of an individual right.¹⁴⁸ *Otis* had seized a Dutch court with a private law claim for damages suffered from anti-competitive practices by the defendant. The Court first found that the prohibition of concerted practices by the Treaty conferred the right on others to claim damages suffered.¹⁴⁹ It then stated that this right was guaranteed judicial protection. The national court therefore had in principle complete jurisdiction to review in law and fact, and that included acts of the national authorities and of the Commission.

Otis indicates that the national court must establish the presence of an individual right in EU law as a matter of law and on the facts of the case. Where the national court cannot do so, it has no guaranteed jurisdiction to decide the case or to make a reference to the Court of Justice pursuant to TFEU art. 257. In a series of subsequent chamber cases, the Court has spelled out that consequence. In *Zakaria*, for instance, the chamber pointed out that the so-called the Schengen Borders Code¹⁵⁰ did confer a right to dignity in border controls as a matter of EU law, but that the referring national court had not established that this right was implicated on the facts of the case. Therefore, the referring court did not have jurisdiction to decide the case and the ECJ did not have jurisdiction to give the requested preliminary ruling.¹⁵¹

This guaranteed jurisdiction of the Member States courts extends to disputes between private parties. It is true that the Charter generally does not obligate private parties.¹⁵² Yet, the Court has not hesitated to resort to the right of judicial protection in such disputes. Charter art. 47 of course then protects both private parties.

¹⁴⁶ *Kadi II*, ¶ 66.

¹⁴⁷ *ZZ*, 50¶.

¹⁴⁸ *Otis*, ¶¶ 42–45.

¹⁴⁹ TFEU, art. 101.

¹⁵⁰ Art. 6(1) Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, 2016 OJ L 77/1.

¹⁵¹ *Zakaria*, ¶¶ 39, 40; *Marcos*, 27 March 2014.

¹⁵² Leczykiewicz (2013).

Accordingly, in *Lindner*, the ECJ Grand Chamber activated Charter art. 47 for both private parties. The case related to the civil action brought by a mortgage loan bank against Lindner whose current address was unknown.¹⁵³ The national court had referred the question whether it had the jurisdiction to proceed in absentia of Lindner as permitted by national procedure. The Court answered that the fundamental right of the applicant to effective civil action had to be balanced with the fundamental right of defense that also applied to civil procedure.¹⁵⁴ The Court concluded that the in absentia-procedure was permitted, provided that the national court had taken all reasonable measures to locate the defendant.

The Court has jurisdiction to give preliminary rulings pursuant to TFEU art. 267 on questions of EU law referred to it by Member States courts. This creates a link with the jurisdiction of the national court to decide on the merits. The Court must have that jurisdiction when the referral concerns an individual right, and it must exercise it fully to the extent demanded by the individual right.

4.2 Rights and Objective Law

This link between judicial protection and the jurisdiction of member states courts over EU law has the logical consequence that full jurisdiction of a national court depends on the controlling rule creating an individual right. The presence of an individual right has become a threshold condition for the fundamental right to judicial protection and hence the guaranteed full jurisdiction of national courts. The guaranteed jurisdiction thus covers only a portion of the *acquis*. The jurisdiction of national courts over EU law which serves collective interests, and thus is merely objective, is not guaranteed.¹⁵⁵ The Court of Justice has indeed drawn this conclusion, for primary and secondary EU law.

The flipside is that the jurisdiction of the Court for a preliminary ruling presupposes the jurisdiction of the referring national court over the merits, which depends the presence of an individual right.¹⁵⁶ The Court has recognised this jurisdictional link. In *ZZ*, the ECJ Grand Chamber first satisfied itself that the reference from the national court related to the individual right of free movement before finding that it had jurisdiction to render the preliminary ruling requested.¹⁵⁷ The flipside is that the ECJ has no jurisdiction for a preliminary ruling where the referring court itself does not have jurisdiction. In several chamber cases, the Court has indeed declined its jurisdiction to answer a referred question because there was no individual right of EU law demonstrably at issue in the national proceedings. The *Zakaria* judgment discussed above demonstrates this *pars pro toto*.¹⁵⁸

¹⁵³ Under Regulation of the Council No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Brussels I*), 2001 O.J. L 12/1.

¹⁵⁴ *Hypoteční banka a.s. v Udo Mike Lindner*, Case C-327/10, [2011] E.C.R. I-11,543, ¶¶ 49–52.

¹⁵⁵ cf Opinion of Advocate General Mengozzi in *DEB*, [2010] E.C.R. I-13,852, ¶ 103.

¹⁵⁶ Infringement proceedings are a means of objective legality control, and do not presuppose individual right, *Danske Slagterier*, [2009] E.C.R. I-2119, ¶¶ 38–39.

¹⁵⁷ *ZZ*, ¶ 38.

¹⁵⁸ Earlier *Chartry*, [2011] I-819, ¶ 25; *Rîpanu*, Case C-407/15, Order of Feb. 18, 2016, not published, EU:C:2016:167, paragraph 19 and the case-law cited; recently Owen Pardue, Case C-321/16, 10 November 2016.

Much of EU primary law is objective. The Treaty provisions on the area of freedom, security and justice are such objective law¹⁵⁹, as are those on economic and monetary union. In *Pringle*, the Full Court faced a reference querying the compatibility with these provisions of the international treaty by which the Eurozone Member States established the European Stability Mechanism. The Court answered that question in the affirmative, but it emphasized that it needed not provide a full review as the relevant Treaty provisions did not create individual rights.¹⁶⁰

The Court has affirmed that much of the EU secondary legislation on environmental matters protects collective interests and therefore is of purely objective-law character.¹⁶¹ It has also drawn the consequences. In *Enichem*, the Court found that the obligation in art. 3(2) of the Waste Directive¹⁶² to inform the Commission in advance of draft rules only concerned the Member States while it did not confer any rights on individuals. Thus, the Member State court did not have EU-jurisdiction.¹⁶³ However, the Court has gone to some length to identify rights for certain individuals under EU environmental legislation which then receive the protection of courts having jurisdiction. The case-law regarding the Environmental Impact Assessment Directive¹⁶⁴ demonstrates the required interpretive operations. Thus, in the pre-Lisbon case *Kraaijeveld* the Court declared that ‘concerned’ individuals had the ‘right’ to invoke in national court the ‘direct effect’ of the directive.¹⁶⁵ The Court there seems to have in mind a procedural right for these individuals. Advocate General Elmer there had pointed out that so concerned was the plaintiff in the main proceedings, whose livelihood was allegedly in danger as a consequence of his not being heard in violation of the EIA Directive.¹⁶⁶ He also affirmed that the directive, by obligating the authorities to hear the public, created a corresponding right.¹⁶⁷ In *Leth*, post-Lisbon, the Court has stated that under that directive there was a right of concerned individuals to have the environmental impact of a project assessed.¹⁶⁸ Concerned natural or legal persons are also entitled to take action where there is

¹⁵⁹ Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost, Case C-27/11, 7 June 2012, ¶¶ 41, 42; Cholakova, Case C-14/13, 6 June 2013, ¶ 24 (relating to TFEU art. 67).

¹⁶⁰ Thomas Pringle v Government of Ireland, Ireland and The Attorney General, Case C 370/12, 27 November 2012), ¶ 34.

¹⁶¹ *Trianel*, ¶¶ 46, 51.

¹⁶² Directive 75/442 of the Council on waste, 975 O. J. L 194/39.

¹⁶³ *Enichem Base v. Comune di Cinisello Balsamo*, Case 380/87, [1989] E.C.R. 2491, ¶ 23.

¹⁶⁴ Directive 85/337 of the Council on the assessment of the effects of certain public and private projects on the environment, 1985 O.J. L 175/40.

¹⁶⁵ *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland Kraaijeveld*, Case C-72/95, [1996] E.C.R. I-5431, ¶ 56; see also *Commission v Germany (Grosskrotzenburg)*, Case C-4311/92, [1995] ECR I-2189; *Inter-Environnement Wallonie ASBL v Region Wallonne*, Case C-129/96, [1997] ECR I-7411. On this issue Edward (2002) 3.

¹⁶⁶ Opinion of Advocate General Elmer in *Kraaijeveld*, [1996] E.C.R. I-5406, ¶ 11 (Directive 85/337 art. 6(2)).

¹⁶⁷ *Id.* ¶¶ 69, 70.

¹⁶⁸ *Jutta Leth v Republik Österreich, Land Niederösterreich*, Case C-420/11, 14 March 2013, ¶¶ 32, 36. But possibly not a right to damages for a breach of that obligation, ¶ 47.

a risk that pollution levels set by environmental directives and designed to protect human health may be exceeded.¹⁶⁹

Given the objective-law character of much environmental law, the EU has legislated to ensure its judicial enforceability, in particular the Directive on Public Participation and Access to Justice¹⁷⁰ that has amended a range of environmental directive. The jurisprudence of the Court relating to this legislation has brought it decisively under the judicial protection norm. Its approach has been that this legislation creates dedicated procedural rights enjoying judicial protection and over which the national courts will therefore have jurisdiction. Thus, in *Trianel*, the Court dealt with the new art. 10a ¶ 3 of the amended EIA Directive.¹⁷¹ The Court acknowledged that the objective of the amendment was to strengthen the judicial enforceability of this objective EU environmental law through representative action of environmental organisations. But the Court then derived from the directive a procedural right of environmental organisations.¹⁷²

The ECJ Grand Chamber has developed this rationale of procedural rights in subsequent cases, referring Charter art. 47. In *Edwards*, the Court stated that the new paragraph 10a ¶ 4 of Directive 85/337 limiting litigation costs served to protect individual rights within the meaning of Charter art. 47.¹⁷³ In *Lesoochranské zoskupenie VLK (Brown Bears II)*¹⁷⁴, again referring to fundamental right of judicial protection under Charter art. 47, the Court found that the new art. 6 ¶ 3 of the amended Habitat Directive gives environmental organisations the right to challenge in court the assessment made by the authorities without public participation. The contrary national procedure must remain disappplied. The procedural autonomy of the Member States becomes limited by their responsibility to ensure judicial protection for these EU law rights.¹⁷⁵ In these cases, the Court then backs up this judicial protection-based interpretative approach with two additional arguments. The effectiveness of EU environmental law requires that natural and legal persons can rely on it in court,¹⁷⁶ and TEU art. 19(1) second subparagraph requires national procedure to provide effective remedies.

¹⁶⁹ *Janecek v Freistaat Bayern*, Case C-237/07, [2008] E.C.R. I-6221, ¶¶ 38 and 39.

¹⁷⁰ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, 2003 OJ L 156/17–25.

¹⁷¹ Directive 2003/35 of the European Parliaments and the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337 and 96/61, 2003 O.J. L 156/17.

¹⁷² *Trianel*, ¶¶ 47, 48.

¹⁷³ *Edwards*, Case C-260/11, 11 April 2013, ¶ 33.

¹⁷⁴ *Lesoochranské zoskupenie VLK v Obvodný úrad Trenčín*, Case C-243/15, 8 November 2016.

¹⁷⁵ *Id.* ¶ 65: “ensuring compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter”.

¹⁷⁶ *Trianel*, ¶¶ 43, 48: The effectiveness of art. 10a ¶ 3 of Directive 85/337 required that actions brought by environmental organisations be admissible to challenge national acts without further standing conditions.

Nevertheless, in the recent *Białowieża Forest* case¹⁷⁷ the Court has demonstrated that the objective infringement procedure, TFEU art. 258, can be an effective means to enforce the range of objective EU environmental directives in the context of a large-scale government policy, there logging in a protected Natura 2000 site, and to deploy financial sanctions outside of the TFEU art. 260, constituting an important addition to the remedies.¹⁷⁸

4.3 Harmonising the Procedure of Member States Courts

Where the national court has jurisdiction, there judicial protection drives for central-uniform procedure, over the decentral-plural procedures that would correspond to the norm of member states' procedural autonomy. The right of judicial protection codified in Charter art. 47 defines three requirements of such central-uniform procedure: effective remedies (¶ 1), right to a court and to a fair process (¶ 2), and legal aid (¶ 3).

4.4 Remedies

Charter art. 47(1) requires an effective remedy. The remedy must ensure that the right in question is realised. Such remedies must exist in public, criminal and civil procedure. It is a consequence of the expansive fundamental right of judicial protection to require the most effective form of action, but the national procedure may choose an alternative if it achieves the level of protection that this standard procedure requires. Pre-Lisbon, the European Court of Justice had already established, directly in EU law, the public law remedies of state liability¹⁷⁹, refund of unlawful charges¹⁸⁰, and interim relief.¹⁸¹ It had based these remedies on various grounds, the system of the Treaties, effectiveness, and judicial protection.¹⁸²

Charter art. 47(1) now has become the sole ground for all these remedies, and the Court continues to develop its doctrine on the conditions of each of these remedies. It has furthermore established a requirement of judicial review of all administrative acts. In *Samba Diouf*, the Grand Chamber of the ECJ states that requirement. It there only accepts that Luxembourg law removes from review the intermediary decision for an accelerated asylum on the condition that the review of the final decision encompasses that intermediary decision.¹⁸³ The Court also requires that legislative

¹⁷⁷ Commission v Poland (*Białowieża Forest*), Case C-441/17, 17 April 2018.

¹⁷⁸ Gormley (2017) at 66.

¹⁷⁹ *Francovich*; a framework for the analysis of the subsequent case law is Tridimas (2001).

¹⁸⁰ *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, Case 199/82, [1983] ECR 3595, ¶12.

¹⁸¹ *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Case C-213/89, [1990] ECR I-2433.

¹⁸² See Opinion of Advocate General Tesauro in *Factortame*, [1990] ECR I-2450, ¶ 23; further Lenearts (2003).

¹⁸³ *Samba Diouf*, [2011] E.C.R. I-7151, ¶ 56.

acts be reviewable. Such legislative review can be entrusted to a specialised constitutional court or, alternatively, to all courts. In *Unibet*¹⁸⁴, handed down during the transition to the Charter, the Grand Chamber found that the right to judicial protection does not require a direct application for legislative review, provided the legislation can be reviewed incidentally in administrative review proceedings and that the applicant does not have to incur administrative or criminal penalties.¹⁸⁵ The Court acknowledged that a direct application would be the most effective form of judicial protection, but found the incidental review open under Swedish law was proportionate considering the national procedure as a whole.¹⁸⁶ It did, however, attach the caveat that the right of judicial protection may demand a specific remedy if otherwise no protection can be obtained.¹⁸⁷ In a complementary manner, the Court in *Melki and Abdeli* states that the centralised constitutional review, obtained through a mechanism of priority question on constitutionality, is compatible with Charter art. 47, provided that the power of each national court remains unfettered to disapply national legislation found by the ECJ incompatible with EU law and to grant interim relief for the protection of rights in the meantime.¹⁸⁸

Charter art. 47(1) requires a remedy also against private parties.¹⁸⁹ *L'Oreal* confirms this. The ECJ Grand Chamber there stated that the right to a remedy requires that the national court may take the requisite measures including injunctive relief, in the absence of national transposing legislation.¹⁹⁰ There also is a remedy of private damages.¹⁹¹

Right and remedy become distinct concepts throughout this jurisprudence, and direct effect assumes the role of one among several remedies.¹⁹² Hence, there may be a right, but there is no remedy of specific performance in EU law as the constant jurisprudence of the Court rules out horizontal direct effect of non-transposed directives. This limit on the remedy is justified by the consideration that directives do not impose substantive law obligations on individuals and thus ultimately by legal certainty.¹⁹³

¹⁸⁴ *Unibet*, Case C-432/05, [2007] E.C.R. I-2271.

¹⁸⁵ *Unibet*, ¶ 64.

¹⁸⁶ *Id.*, ¶¶ 41, 42. See also Opinion of Advocate General Sharpston in the case, [2007] E.C.R. I-2275, ¶ 56.

¹⁸⁷ *Id.* ¶¶ 56–65.

¹⁸⁸ *Melki and Abdeli*, Joined Cases Case C-188/10 and Case C-189/10, [2010] I-5667, ¶¶ 63–75. The Court reiterated the *Melki* and *Abdeli* criteria in *A v. B*, Case C-112/13, 11 September 2014 and Case C-5/14, *Kernkraftwerke Lippe-Ems*, 4 June 2015.

¹⁸⁹ *Lenaerts* (2011).

¹⁹⁰ *L'Oreal*, [2011] E.C.R. I-6011, ¶¶ 141 and 142.

¹⁹¹ *Otis*, 6 November 2012, ¶ 43.

¹⁹² *Dougan* (2007) at 934.

¹⁹³ *Seda Küçükdeveci v Swedex GmbH & Co. KG*, Case C-555/07, [2010] I-365, ¶ 46.

4.5 Access to Court

Charter art. 47(2) first sentence requires access to a court, albeit not to several levels of jurisdiction.¹⁹⁴ That court must satisfy the standards of independence and subjective and objective impartiality.¹⁹⁵ Doctrine furthermore states that the court must be fully competent for review in law and fact¹⁹⁶, and have the power to disapply offending national law, including constitutional law.¹⁹⁷ Such access can be limited in national procedure for recognised objectives, provided the means chosen are proportionate.¹⁹⁸

The proportionality of standing, time-limits and *res iudicata* and other conditions provided in national procedure becomes subject to fine-grained analysis. Thus, in *Samba Diouf*, the General Chamber considered the time-limit for challenging the administrative decision in asylum cases under Luxemburg law to be proportionate for legal certainty.¹⁹⁹ In *Alassini*, the Court found the requirement in Italian law to attempt of an out-of-court settlement in disputes between providers and end-users under the Universal Service Directive²⁰⁰ not disproportionate since it left subsequent access to court unfettered.²⁰¹ National law may provide for *res judicata*.²⁰² But in *Club Hotel Loutraki AE*, the Court found the standing requirement in Cyprus law that members of a bidding consortium could only collectively challenge a procurement decision to be a disproportionate restriction.²⁰³

4.6 Fair Process

Under Charter art. 47(2), the process before the national court must be fair. Fairness becomes the standard for all procedural institutions, including party disposition, burden of prove, and evidence. Again, it is the individual right that determines fairness of the procedure.²⁰⁴ *Oceana Group Editorial* is illustrative. There, the Grand Chamber pointed out that the purpose of the EU consumer protection directives was to level the playing field between the consumer and economically powerful market

¹⁹⁴ *Samba Diouf*, [2011] E.C.R. I-7151, ¶ 69.

¹⁹⁵ *Altner v Commission*, Case C-411/11 P, 15 December 2011, ¶ 15.

¹⁹⁶ *Melki*, [2010] E.C.R., I-5667, ¶¶ 63–75.

¹⁹⁷ *Id.* ¶ 63.

¹⁹⁸ *Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG v Commission*, Case C-73/10 P, 16 November 2013, ¶ 53.

¹⁹⁹ *Samba Diouf*, [2011] E.C.R. I-7151, ¶¶ 66–70.

²⁰⁰ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and users' rights relating to electronic communications networks and services (Universal Service Directive), 2002 O.J. L 108/51.

²⁰¹ *Alassini*, [2010] E.C.R. I-2213, ¶ 65.

²⁰² *Ufficio IVA di Piacenza v Belvedere Costruzioni Srl*, Case C-500/10, 29 March 2012.

²⁰³ *Club Hotel Loutraki AE*, [2010] E.C.R. I-4165, ¶¶ 78, 80. Earlier in *Safalero Sri v Prefetto di Genova*, Case C-13/01, [2003] I-8679, ¶ 54, the Court had accepted a standing requirement that limited the protection of the movement of goods to an action against the member state, but did not allow intervention in proceedings against a third party.

²⁰⁴ *ZZ*, ¶¶ 48–69.

participants. That purpose demanded that national courts have the power to raise proprio motu unfair terms in consumer contracts.²⁰⁵ While the disposition principle in national civil procedure that binds the court to the pleadings of the parties may ensure a fair hearing in general, that is not the case when these specific rights are at stake.

Charter arts. 47(2) and 48 specify the fair process through several sub-requirements, in particular right of defense, equality of arms, and the right to be heard. ECJ doctrine establishes that these apply to all procedures. In *ZZ*, the Grand Chamber confirmed that the right of defense guarantees an adversarial procedure in administrative law as well and thus the right of the defendant to know the grounds of an adverse decision.²⁰⁶ *M. G.* clarifies that a serious violation of the right to be heard can have the consequence that a detaining measure must be quashed.²⁰⁷ In *Lindner*, the Court stated that the right of defense also applies to civil procedure, providing standards for the proceedings in absentia permitted in Hungarian civil procedure. In *Otis*, the Grand Chamber stated that equality of arms is a standard for civil procedure.²⁰⁸

The Charter further structures the criminal trial through its arts. 49 and 50. These are the presumption of innocence and the right of defense²⁰⁹, legality and proportionality of criminal offences and penalties²¹⁰, and ne bis in idem.²¹¹ These apply to criminal proceedings under national law.²¹² The Court has extended them to administrative procedures for the sanctioning of individuals, particularly Union citizen having exercised their free movement rights.²¹³ This reflects the case-law of the European Court of Human Rights which attaches the safeguards of art. 6 ECHR to all detention cases.

Certain substantive fundamental rights of the Charter yield subject-specific procedural requirements. Thus, in *Aguirre Zarraga*, the Court found that the right of the child, Charter art. 24, required that the child be heard by the court.²¹⁴ Union citizenship also engenders them, such as the right to a use one's own language in court proceedings of the host state.²¹⁵

²⁰⁵ *Cofidis SA v Jean-Louis Fredout*, Case C-473/00, [2002] E.C.R. I-10875, ¶ 35.

²⁰⁶ *ZZ*, ¶ 55.

²⁰⁷ *MG and N. R.*, Case C-383/13 PPU, 10 September 2013.

²⁰⁸ *Otis*, ¶ 71.

²⁰⁹ Charter art. 48.

²¹⁰ Charter art. 49.

²¹¹ Charter art. 50.

²¹² Proceedings concerning the enforcement of a financial penalty issued against Marián Baláž, Case C-60/12, 14 November 2013.

²¹³ *ZZ* determines this for the free movement right of citizens in entry control cases.

²¹⁴ *Joseba Andoni Aguirre Zarraga v Simone Pelz*, Case C-491/10 PPU, [2010] E.C.R. I-14,247, ¶ 61.

²¹⁵ *Ulrike Elfriede Grauel Rüffer v. Katerina Pokorná*, Case C-322/13, 27 March 2014.

4.7 Legal Aid

Charter art. 47(3) requires that legal aid be made available by national procedure where that is necessary for effective court access. On legal aid, there is the arguably the greatest variety and the least consensus between the member states. Yet, the chamber in the *DEB* case establishes central-uniform doctrine on legal aid for all individual rights under EU law.²¹⁶ The Court concluded that art. 47(3) also protects legal persons such as DEB, and that legal aid therefore had to be provided to them for enforcing their rights under EU law. The Court balanced the rationale of art. 47(3) with the countervailing considerations underlying the national rule that was more restrictive for legal persons, finding it disproportionate.²¹⁷ The Court relied on Charter art. 47(3) to establish an EU-autonomous protection level higher than ECHR art. 6(3)(c) ECHR that only requires legal aid in criminal cases.

5 Judicial Protection as Constitutional Core

Judicial protection becomes the meta-norm for the EU judicial architecture, reorientating it towards protecting individual rights guaranteed in EU law, against contestation either from the European Union or the Member States, with the far-reaching consequences documented earlier in this article. In this transformational process, judicial protection working as hard or formal meta-norm, prevailing over competing principles that would shape the EU judicial architecture. It overcomes the absolute authority of (objective) EU law against contestation. It prevails over competing principles, such as non-justiciable political discretion of the EU institutions, the procedural autonomy of the Member States, and the even the mutual trust in the Member States' judicial systems. This capacity of Judicial protection is maintained even when the conflicting principle is enshrined in primary law. Judicial protection hence becomes a constitutional core in EU primary law in the sense that Treaty-amendment by the Contracting Parties cannot limit its reach. The finding begs the question whether this status is justified. The answer turns on legal and normative grounds.

In legal terms, the Charter and the TEU as amended by the Lisbon Treaty privilege judicial protection. They formalise judicial protection at the apex of the normative hierarchy of the EU legal order. The Charter enshrines judicial protection as a fundamental right and the TEU makes providing it an obligation on Member States and indeed a condition of the very membership in the European Union. Although a decade has passed since the entry into force of the Lisbon Treaty, it remains the relevant expression of the highest authority, the Treaty-giver, comprising the Constitutional Convention, the Intergovernmental Conference and the ratifying parliaments of all Member States.²¹⁸ This positive decision of the Treaty-giver, through the Lisbon Treaty amendments, contrasts sharply with their decision not to formalise any

²¹⁶ *DEB*, ¶¶ 45–52.

²¹⁷ *DEB*, ¶ 61.

²¹⁸ A full discussion of the position of the Treaty-giver in EU law is beyond the scope of this article.

of the other possible design precepts of the judicial architecture. In particular, the standards of minimum effectiveness and equivalence and also the procedural autonomy of the Member States remain unwritten general principle of EU law, located at a lower rung of the normative hierarchy. The Court's jurisdiction extends to the Charter and the Treaty manifestations of judicial protection. That authorises the Court to progressively develop and strengthen judicial protection, hedged by the Charter's prescriptive methodology that also applies to the fundamental right to judicial protection.

More interesting is the question of whether judicial protection should become such a hard, constitutional meta-norm. The affirmative normative argument connects judicial protection with a Dworkinian framework. Professor Dworkin has shown that rights supplement the positivist account of law.²¹⁹ In this account, rights even if formalised as legal rights remain values and therefore retain a normative quality. There is a source right of all legal rights and proximity to it informs the normative quality of other rights.²²⁰ This normative quality of rights entails that they ought to be taken seriously, avoiding the costs of any erroneous limitations. Thus, rights are to be interpreted expansively when contested for collective goals in concrete instances.²²¹ Taking rights seriously in this way depends on courts and judges, capable of finding the one correct answer even in hard cases.

Judicial protection formalised as a fundamental right retains this normative quality. As such, it is to be taken seriously. Judicial protection therefore ought to be interpreted expansively vis-à-vis any contestation in the shape of restrictive procedural principles and rules. Moreover, judicial protection determines selectively which EU law becomes reality on the ground, and, as this article has shown, that means the rights of individuals. The normativity of judicial protection then lies in securing access to a court in order to take *other* rights seriously, which are created in primary, secondary and tertiary EU law. The perimeter of these rights enables individuals to lead a life in self-determination. Individual self-determination is a key expression of human dignity, which is the source right guaranteed at the top of the Charter (art. 1), and a value in which the EU legal order is grounded (TEU art. 2). Taking self-determination seriously means that errors in the application of the included rights ought to be minimised, whether contested by Union authorities, by Member State authorities, or by private parties. Judicial protection is the vehicle for discharging this demand when it matters, because the individual will find herself typically in the minority constellation of being the national of another Member State confronts authorities representing the collective interest. It then matters that rights have one right answer.²²² Judicial protection enables the EU judicial architecture to give this answer. It reaches it through the rationalising methodology that the Charter prescribes.

²¹⁹ Dworkin (1997).

²²⁰ *Ibid.*, at 272–8.

²²¹ *Ibid.*, at 184–222.

²²² *Ibid.*, at 81–131.

This justification, of course, rests on the premise that the European Union is indeed an actor for justice as reflected in its legal order. But, if the EU is an actor of injustice, simple judicial protection would be of little use, without addressing deficiencies in that legal order.²²³ Here is not the place to even attempt to reach a definitive conclusion on whether the EU might be an actor for injustice rather than justice²²⁴, but merely to confirm the indissociable connection between content and enforcement of its law.

Departing from this Dworkinian reading, Lindeboom has recently argued that the Court was committing itself instead to legal positivism, constructing an EU legal order that conforms to Raz's theory of the necessary conditions for a legal system: comprehensiveness, openness and a claim of supremacy.²²⁵ By taking judicial protection and thus the rights-content of EU law seriously, the Court is reasserting itself as a Dworkinian court. Where the foundations of EU law as a new legal order are concerned, there the jurisprudence of the Court is best explained as developing a 'community of principle'.²²⁶ This European community is distinct each of the Member States.

6 Conclusions

The article has argued that judicial protection serves as the meta-norm for governing the EU judicial architecture resting on the two pillars of the EU judiciary and the Member States judiciaries. Judicial protection prioritises individual rights created in EU law. These rights are to be protected if contested in name of collective interests either of the European Union or a Member State and in the same manner before all courts of the EU or of the Member States. Judicial protection-as-norm directs an expansion of the EU judicial architecture along three dimensions, horizontally towards full review by the Court of all acts of the political institutions, vertically towards central-uniform jurisdiction and procedure for national courts, and towards coordination between both pillars. Judicial protection welds the organisationally separate EU and Member States judiciaries into one coherent judicial function, on which the rule of law in the EU comes to rest.

This meta-norm of judicial protection becomes progressively institutionalised, through the Charter of Fundamental Rights, the Treaty on the European Union, and the related doctrine of the Court of Justice. Charter art. 47 formalises a fundamental right of judicial protection at the core of judicial protection then is the individual right. It defines the federal question in EU law. This is a thick, evaluative concept. The Court is responsible for concretising this fundamental right into requirements, by balancing the principle of effective rights protection with any countervailing general objectives of an orderly procedure. These requirements become standards for the procedural legislatures of the European Union and the Member States.

²²³ Williams (2010) and Kochenov et al. (2015).

²²⁴ O'Brien (2017) (reasons why the EU could be an actor of injustice).

²²⁵ Lindeboom (2018).

²²⁶ Bengoetxea (1993) vi.

Judicial protection drives the development of the EU judicial architecture. It produces the contours of a single code of procedure spanning the judiciaries of the European Union and of the Member States. This code comprises doctrines of jurisdiction, a common procedure, and coordination mechanisms between the EU and Member States courts. The fundamental right to judicial protection guarantees national courts full jurisdiction to decide on the condition of the presence an individual right. The interpretive jurisdiction of the Court of Justice complements this rights-orientated jurisdiction to decide. Once jurisdiction is established, courts have the necessary powers to give effect to that right whether contested by public authorities or by private parties. They exercise their jurisdiction through a harmonised procedure, and in a coordinated fashion with the EU courts, the courts of other member states, and increasingly also with the courts of non-member states and international courts. This single code absorbs other doctrines, such as minimum effectiveness and equivalence for Member State procedure, and the complete system of remedies before the EU courts.

It would be naïve to ignore that the EU judicial architecture is faced with unprecedented structural challenges at Member States level. The article's findings imply that these challenges are being addressed, also, through the meta-norm of judicial protection. The requirements of judicial protection are enforced by the European Union under art. 7 of the TEU. These minimum conditions of EU membership and the comprehensive obligation under art. 19 TEU for each Member States to provide for judicial protection through their judiciaries absorb and reinforce the requirements of judicial protection articulated by the Court in the interpretation of the fundamental right that everyone holds to receive the protection of the courts in the defense of their EU law rights.

Institutional judicial protection furthermore becomes a hard or formal meta-norm within the primary law, not at the disposition of the High Contracting Parties. Hence, the Treaties must not include rules incompatible with an effective protection of individual rights, and even less secondary law. Judicial protection overrides all conflicting principles, aiming at preserving non-justiciable decision-making of the EU's political institutions, the procedural autonomy of the Member States, or their mutual trust. This elevated, constitutional status of judicial protection is justified, as a matter of positive law and normatively. Judicial protection makes human dignity—in the sense of individual self-determination within the perimeter of EU law rights—actual rather than aspirational. This includes all rights-holders, EU citizens and third-country nationals, in the process of European integration. Their rights are taken rights seriously in a Dworkinian sense: when a right is contested in the name of collective interests, or other private interests, judicial protection minimises the error costs. Judicial protection, then, instantiates a novel category of hard, or constitutional meta-norms, with transformative potential for the EU legal order.

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